FIRST JUDICIAL DISTRICT
COUNTY OF SANTA FE
STATE OF NEW MEXICO

NEW ENERGY ECONOMY,

Plaintiff, No. D-101-CV-2022-00545

v.

THE OFFICE OF THE ATTORNEY GENERAL OF NEW MEXICO, HECTOR BALDERAS,

Defendant.

PLAINTIFF NEW ENERGY ECONOMY'S RESPONSE TO DEFENDANT'S MOTION TO DISMISS, MOTION FOR SANCTIONS AND MOTION TO STRIKE

Defendant's motions to dismiss, for sanctions and to strike must be denied because plaintiff's complaint sets forth facts that, when read in the light most favorable to plaintiff, entitle plaintiff to the relief sought. The Inspection of Public Records Act (IPRA), NMSA 1978 14 -2-1 *et seq* mandates that state agencies must produce public records within a reasonable time frame, and if denying a request to release a record, must follow specific protocols and explain the denial. Plaintiff seeks the records pertaining to the defendant's contracts with private counsel to handle state business, with a particular focus on one attorney, Marcus Rael, who seems to have received an inordinate amount of state business and state money, for contracts for services he has entered into with his former colleague, Attorney General Hector Balderas. Rather than providing those records, defendant has turned over records related to some of the cases, but not all of them, and has heavily redacted the records that it has turned over, citing attorney/client privilege or work product, with no explanation as to how contracts for services and billing information related to state contracts is attorney/client or work product, and without following the protocol

set forth in the law, NMSA 1978 14-2-11(B). Plaintiff's complaint states facts which, by law, amount to a violation of the Inspection of Public Records Act; moreover, the complaint does not contain unwarranted allegations, but instead states facts – all of which are relevant -- and thus, no sanctions or striking of portions of the complaint are warranted. Instead, rather than taking the defendant's unproven assertions of no wrong-doing as true, this Court should permit the case to proceed so that plaintiff has the opportunity to try the case on the merits, and prove, as stated in the complaint, that defendant has failed to disclose public records about its contracts for services with attorneys using state monies.

I. The complaint states facts which demonstrate a provable violation of the Inspection of Public Records Act.

"Dismissal under [Rule 12] is a drastic remedy..." *Rummel v. Edgemont Realty Partners, Ltd.,* 1993-NMCA-085, ¶ 9, 116 N.M. 23. "The general policy of the Rules requires that an adjudication on the merits rather than technicalities of procedure and form shall determine the rights of litigants." *Carroll v. Bunt*, 50 N.M. 127, 130, 172 P.2d 116, 118 (Sup. Ct. 1946) (internal citations omitted).

In ruling upon a motion to dismiss, the Court must construe the complaint in a light most favorable to the party opposing the motion and with all doubts resolved in favor of the sufficiency of the complaint. *Shea v. H.S. Pickrell Co.,* 106 N.M. 683, 685, 748 P.2d 980, 982 (Ct. App. 1987). If there are any circumstances under the facts provable under the claim in which plaintiffs might prevail, the case should not be dismissed. *Pattison v. Ford,* 82 N.M. 605, 606, 485 P.2d 361, 362 (Ct. App. 1971). The possibility of recovery based on a state of facts provable under the claims bars dismissal. *Trujillo v. Berry*, 1987-NMCA-072; 106 N.M. 86, 738 P.2d 1331.

Furthermore, New Mexico courts still abide by the notice pleading requirements of Rule 8, which mandates only that the general allegations be set forth, showing why plaintiffs are entitled to relief and giving the parties and the court a fair idea of the complaint and the basis for relief. *Schmitz v. Smentowski,* 109 N.M. 386, 389-90, 785 P.2d 726, 729-30 (Sup. Ct. 1990).

The essential facts in plaintiff's complaint are as follows:

On April 9, 2021, plaintiff made an IPRA request to the defendant, the AG's office, and received only a partial, incomplete and redacted response on May 12, 2021. Complaint, ¶ ¶ 25 – 28. On June 11, 2021, Plaintiff again wrote to the defendant, explained the problem with the response and asked that the response be completed, pointing out with specificity documents that were known to exist but were missing, and redactions which were improperly made and needed to be unredacted. Complaint, ¶ 29. For example, plaintiff showed that there were at least seven files concerning contracts with outside counsel for which there were no invoices (complaint, ¶ 29a); plaintiff also showed invoices were redacted or missing 60 plus pages (complaint ¶ 29b); and plaintiff showed that there were at least four cases in which Marcus Rael had been appointed by the AG's office but the AG produced no responsive documents. Complaint ¶ ¶ 29c and 34. While initially the defendant responded that it was looking into plaintiff's request to complete the IPRA response, and would provide more information once they had investigated it (complaint, ¶ 31), on July 12, 2021, the defendant sent a strange, non-responsive correspondence on the matter, saying simply "I have forwarded your email onto the appropriate individual and have not heard back from them." Complaint, ¶ 33. Plaintiff tried again on July 13th 2021 to get a response and did not hear back from the defendant. Complaint, ¶ 34.

On August 2, 2021, plaintiff again tried to get a complete IPRA response from the defendant. This time, the defendant said it would respond by September 10, 2021, but again, it did not do so. Complaint, ¶ 36.

Additionally, on December 13, 2021, plaintiff made one last attempt to have the defendant fulfill its duties under IPRA. Complaint, ¶ 37. On December 28, 2021, rather than produce the required documents, the defendant gave a statement that made little sense and did not fall under an IPRA exception. Complaint, ¶ 37

Thus, plaintiff has demonstrated in its complaint that there are files and contracts between Marcus Rael and the AG's office for which no responsive records were produced. The plaintiff has also demonstrated that other files are missing more than 60 pages, and that other files contained heavy redactions without a specific enough reason to explain an attorney / client or work product exemption. Plaintiff also demonstrated that the defendant made promises to produce documents and then failed to do so. Plaintiff also demonstrated that defendant gave a bizarre explanation for missing documents that did not explicitly respond to each public records request or each document, again out of compliance with IPRA requirements. Thus, far from dismissing the case, this court should set the case for trial so that plaintiff has the opportunity to present evidence and prove each allegation in the complaint, and cross examine defendant and his staff to reveal the incompleteness and illegality of their responses. Again, the defendant's assertion that it has complied with the law must be tested when the facts stated in the complaint show otherwise.

As stated by defendant, the purpose of a Rule 12(b)(6) motion to dismiss is to test the legal sufficiency of the complaint, accepting all well pleaded factual allegations as true. See defendant's motion at 4. Thus, it is improper, in a motion to dismiss, for the defendant to attempt

ro add "facts" to the case that are supportive of its position, or to contradict the facts alleged in plaintiff's complaint. Instead, the facts in plaintiff's complaint must be accepted as true, and the test is whether those facts state a case upon which legal relief could be granted. *Gomez v. Bd of Education*, 1973-NMSC-116, 85 N.M. 708, 516 P.2d 679. Yet, rather than taking the facts in plaintiff's complaint as true, and determining their legal weight, defendant's motion is replete with assertions that contradict the facts in the complaint, and simply assert over and over that defendant did no legal wrong. Just because defendant states, over and over, that it produced all responsive records, does not make it a fact -- especially when Plaintiff's complaint shows the contrary. [1]

II. The Complaint states facts that are relevant to the AG's motive to lie or hide information, and thus, should not be stricken, and do not warrant sanctions.

In their complaint, plaintiff demonstrates reasons why the defendant would have motive to hide some of the requested information from the public. While defendant now moves to have those parts of the complaint stricken, and even to sanction plaintiff for daring

[1] For example, the following statements are wholly inappropriate in a motion to dismiss:

- "All responsive records, as well as responses to all prior correspondence, were produced and provided on December 28, 2021, including additional records found that were responsive to the initial April 12 IPRA request" (Defendant's motion at 3)
- "All responsive records in OAG's possession were provided prior to Plaintiff filing this Complaint" (Defendant's motion at 3);
- "Because the responsive records were produced, the IPRA matter was considered closed by the OAG" (Defendant's motion at 2);
- "Ms. Salazar left the OAG on October 1, 2021" (Defendant's motion at 3);

Indeed, whether or not all responsive records were provided is exactly the factual question before this Court; the facts, as pleaded in the complaint, show that all responsive records were not provided.

to raise the issue, it is in fact relevant to the IPRA case to show the extent of the relationship between the AG's office and the contracting attorney, Marcus Rael, as well as the number of cases Marcus Rael had with the AG's office, the money that attorneys who are awarded contracts have donated to the AG's campaign, and the Public Regulation Commission Hearing Examiner's findings in a very large case of great public importance that the relationship between Mr. Rael and the AG's office created a conflict of interest. Indeed, these facts, when taken as true, show a motive for the AG to hide public information.

While defendant asserts "[w]ithout evidence to the contrary, the Court must accept as true the statement by OAG that the office does not have the records plaintiff believes it does," (motion at 6), in fact, plaintiff has provided evidence in their complaint to show that further records exist and a reason for the defendant to try to hide those records; these are the very portions of the complaint that defendant moves to strike from the complaint and to sanction plaintiff for including in the complaint. Since it is plaintiff's position that the AG simply is not telling the truth when it says it has produced all public records concerning Marcus Rael's contracts with the AG, the plaintiff's complaint is strengthened by proving a motive to lie, along with proving the absence of records about which plaintiff is aware.

Thus, it is relevant that:

1. A Hearing Examiner at the PRC found that an attorney that the Attorney's Office contracted with, Marcus Rael, had a conflict of interest in representing an international corporation, Iberdrola, in the PNM merger case because of his simultaneous representation of the AG and Bernalillo County in other matters, when the AG and Bernalillo County were parties in the merger case. Complaint, paragraphs 12 – 19.

2. The Hearing Examiner expressed concern that Marcus Rael's representation of Iberdrola in the merger case could call into question the integrity of the entire proceeding, since Marcus Rael also had an attorney client relationship with the AG. Notably, the AG changed its position in the case from opposing the merger as not being in the public interest to supporting the merger, after Marcus Rael began representing the Iberdrola that wanted to merge. Complaint paragraphs 20 – 24.
3. The AG has entered into many lucrative contracts for legal services to attorneys who end up being large contributors to his campaign, including to his former colleague, Marcus Rael; the AG does not include a lot of this information on its so-called "sunshine portal." Complaint, paragraphs 39 – 42.

Moreover, each individual paragraph about which defendant complains – paragraphs 12 – 24 and 39 – 42 -- are factual and not based on speculation or opinion. Paragraphs 12 – 24 simply lay out the public record in the PRC case which involved an application for an approval of a merger between Avangrid and PNM. None of the paragraphs state anything new – all of the paragraphs simply reiterate the publicly available findings and the public proceedings in that PRC case. While defendant may not think those facts are relevant to this case, plaintiff disagrees, again because the facts demonstrate plaintiff's initial interest in requesting the public records that are the subject of this case, and those records would have been helpful to proving plaintiff's position in that PRC case. Indeed, at the same time that plaintiff was attempting to obtain the public records from the defendant, plaintiff was litigating the PRC case and moving the hearing examiner to remove subpoena Rael from the case based on his concurrent conflict of interest in violation of Rule16-107 NMRA . In the end, Rael was disqualified as a result of the

information that the plaintiff had; if defendant had timely turned over the public records requested, plaintiff would have had more information to show the Hearing Examiner about the extent of the relationship between Mr. Rael and the AG's office. Far from irrelevant, these facts are the basis for the IPRA request. If the facts are scandalous, that is an opinion that the AG's office has apparently drawn. Scandalous or not, the facts are the facts and nothing in plaintiff's complaint is unfactual.

Likewise, paragraphs 39 – 42 of the complaint are also factual statements, all supported by evidence set forth in the complaint. These paragraphs state facts about the incompleteness of what the AG reports on its "sunshine portal," the contracts that the AG has awarded to Mr. Rael and his lawfirm, the relationship between Mr. Rael and AG Balderas, and political contributions received by AG Balderas from people to whom he has awarded contracts from which Mr. Rael has benefitted. These paragraphs do not make unwarranted allegations or accusations. They simply state facts. Again, if defendant finds these facts to be scandalous, that is the defendant's opinion about its own conduct. These factual paragraphs support the Causes of Action in the complaint showing the motive for the AG to fail to produce the requested public records.

Moreover, the facts showing the motive for the AG to lie or hide information are relevant to the appropriate damages award in the case. Plaintiff pled facts that show that far from being a technical or inadvertent mistake that led to not producing public records, there is clearly a motive for the AG to hide this information and then to come to court in the very manner it has, kicking and screaming and claiming that it is he who has been wronged and calling to sanction plaintiff for daring to confront him or raise the issue. At the very least, this is classic projection; or perhaps better recognized as gas lighting, in its harshest form.

It is in fact defendant who makes scurrilous accusations against plaintiff – saying plaintiff has made "unfounded and spurious allegations" (Motion at page 1) and plaintiff "persists in these fallacious allegations, " (motion at 3), when the complaint contains only facts – facts that the AG's office does not like. Defendant goes on to say that plaintiff has made "similar allegations" in other fora – perhaps meaning that plaintiff has raised similar facts in other fora – but not similar allegations – the only allegations here are a violation of IPRA. Just because defendant does not like the facts that plaintiff has pled does not make plaintiff's actions inappropriate, let alone sanctionable. Because defendant does not and cannot point with specificity to any "unfounded allegation," defendant's requests for sanctions is without merit.

III. Naming the AG's office as a whole, rather than the records custodian, is proper in this case.

The N.M. Attorney General's office is the named defendant in this case, which includes the attorney general himself, Hector Balderas, as well as all of the staff, including the records custodian. Thus, while it is true that the Inspection of Public Records Act states that an IPRA case shall be brought against the records custodian, that position and more is covered by naming the whole agency. And in this case, naming the whole agency was required because it is clear from the correspondence received from defendant in response to plaintiff's public records request, the decisions to deny disclosure of public records were being made by others in the office -- not the records custodian. *See, e.g.* paragraph 33 of plaintiff's complaint "Ms. Salazar [the records custodian] replies on July 12, 2021 and stated, 'I have forwarded our email on to the appropriate individual and have not heard back from them;" *and see* Exhibit D to Plaintiff's complaint "Person responsible for denial: Cholla Khoury, CIPP/US, Director, Consumer and Environmental Protection Division." Moreover, because this case involves records related to

Attorney General Hector Balderas' contracts with his former colleague, Marcus Rael, it is appropriate that the Office of the A.G., and the A.G. himself, be named.

Additionally, there is no basis in the law to dismiss a case simply because an appropriate party has not been named:

> New Mexico adheres to the broad purposes of the Rules of Civil Procedure and construes the rules liberally, particularly as they apply to pleading." *Las Luminarias of the N.M. Council of the Blind v. Isengard,* 92 N.M. 297, 300, 587 P.2d 444, 447 (Ct.App.1978). "`The general policy of the Rules requires that an adjudication on the merits rather than technicalities of procedure and form shall determine the rights of the litigants.'" *Id.* (quoting *Carroll v. Bunt,* 50 N.M. 127, 130, 172 P.2d 116, 118 (1946)).
>
> The rules are to "be construed and administered to secure the just, speedy and inexpensive determination of every action." Rule 1-001 NMRA 2002. "All pleadings shall be so construed as to do substantial justice." Rule 1-008(F) NMRA 2002. "Misjoinder of parties is not ground for dismissal of an action. Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just." Rule 1-021 NMRA 2002.

Martinez v. Segovia, 2003-NMCA-023, para 10 – 11, 133 N.M. 240. Even in the case relied upon by defendant, *Pacheco v. Hudson*, 2018-NMSC-022, the Court simply substituted the records custodian for the defendant, with no further ado. Plaintiff is amenable to adding the records custodian as a defendant to the case. In fact, plaintiff asked defendant for its concurrence to file an amended complaint which simply added the records custodian as a defendant but defendant would not agree to this addition. See email correspondence, attached as Exhibit 1.

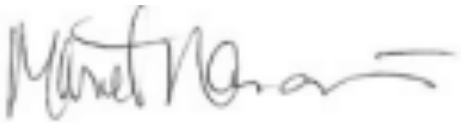
IV. Conclusion

Plaintiff's complaint contains facts which demonstrate a violation of the public records act and a motive for withholding that information and a reason to award damages to plaintiff. If the defendant's position stated in their response to plaintiff's IPRA request and again stated in this motion to dismiss were accurate, it would mean that defendant is entering into contracts with

a private attorney, paying that attorney with state money, and keeping no records on the matter. Plaintiff says this because there is proof that the AG retained Marcus Rael in certain cases, and yet the AG did not produce any records related to those contracts. And clearly, if the AG is granting a large number of lucrative contracts to his friend, and not keeping clear records of that use of public money, this would be a violation of his position as the Attorney General, a violation of the public trust, and a violation of the law. He would not want to admit that here, or reveal that through a response to a public records request. Plaintiff should be given an opportunity to prove the merits of their well-pleaded case, meaning defendant's motion to dismiss should be denied.

Dated: June 15, 2022.

Respectfully submitted,



Mariel Nanasi, Esq.
New Energy Economy
300 East Marcy Street
Santa Fe, NM 87501
(505) 469-4060
mariel@seedsbeneaththesnow.com
Attorney for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing pleadings was provided to all counsel of record via the Odyssey e-filing platofrom on this 15th day of June, 2022.

/s/ Mariel Nanasi,
Mariel Nanasi, Esq.
Attorney for the Plaintiff

Exhibit 1

Re: No. D-101-CV-2022-00545, NEE v. AGO -- leave to amend

External Inbox ×

Mariel Nanasi <mariel@seedsbeneaththesnow.com>
to Erin, Loretta, bcc: Gail

Wed, Jun 1, 5:38 PM

Good afternoon counsel,

Would you agree to allow New Energy Economy to file the attached amended complaint? It is essentially the same complaint, but names the designated records custodian. Under Rule 1-055 "... a party may amend its pleading only by leave of court or by written consent of the adverse party, and leave shall be freely given when justice requires."

Then you could re-file your Motion to Dismiss, minus the issue that New Energy Economy didn't include the designated records custodian as a defendant. Would you be amenable to that?

If yes, I will file it tomorrow.

Thank you for your consideration. I look forward to hearing from you.

Mariel Nanasi

Executive Director

New Energy Economy

Ogaa Po'ogeh - unceded occupied Tewa land

300 East Marcy St., Santa Fe, NM 87501

505-469-4060 (cell)

www.NewEnergyEconomy.org

Lecocq, Erin
to Scott, Cholla, me, Loretta

Thu, Jun 2, 12:11 PM (13 days ago)

Ms. Nanasi,

Thanks for reaching out. I don't think the Complaint as amended cures the defect that we've noted in our motion to dismiss, so I can't consent to amend the complaint at this time.

Best,

•••